U.S. Department of Labor

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Issue Date: 23 July 2003

CASE NO.: 2003-STA-00015

In the matter of

TERRY CHARLES
Complainant

v.

ESTES EXPRESS LINES
Respondent

Appearances:

Terry Charles
Pro Se

David L. Terry, Esquire
For Respondent

RECOMMENDED DECISION AND ORDER

This proceeding involves a complaint under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the Act), as amended, 49 U.S.C. Section 31105 (formerly 49 U.S.C. § 2305), and its implementing regulations found at 29 C.F.R. Part 1978. Section 31105 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

Complainant Terry Charles (Charles) filed a complaint with the Secretary of Labor, Occupational Safety and Health Administration (OSHA) on October 8, 2002, alleging that Respondent, Estes Express Lines (Estes) discriminated against him in violation of Section 405 of the Act. Following an investigation, the Secretary of Labor served its Findings and Preliminary Order on December 23, 2002, denying relief. On January 20, 2003, Complainant appealed that finding to this office.

A Notice of Hearing was issued scheduling a formal hearing on May 7, 2003 in Winston-Salem, North Carolina. An attempt at mediation was unsuccessful. All parties

were afforded full opportunity to present documentary evidence, testimony, and arguments as provided in the Act and applicable regulations. Charles submitted three exhibits and Estes submitted thirty-two exhibits which were received into evidence.[1] In addition, all parties were afforded the opportunity to submit post-hearing briefs. This decision is based upon a full consideration of the entire record.

Post-hearing briefs were received from Charles and Estes. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

THE PARTIES' CONTENTIONS

Charles alleges that Estes required him to drive on runs that could not be accomplished in a safe and legal manner. In order to complete his runs within the time frames demanded by Estes, he was forced to exceed speed limits and falsify his log books. Charles further alleges that Estes terminated his employment because he complained of safety regulation violations regarding his runs and because he did not return from his runs within the time frame established by Estes. Charles seeks relief in the form of reinstatement to his former position with Estes. He is also seeking the return of his seniority, benefits, and lost wages, along with compensation for mental stress.

Estes asserts that the runs Charles was assigned could have been driven in a safe and legal manner, and that Estes therefore did not direct Charles to operate his vehicle in violation of any laws or safety regulations. Estes further asserts that Charles was terminated for reasons unrelated to any complaints made by him regarding safety or legal issues. Estes contends that the termination was motivated by Charles' insubordination, refusal to immediately take a random drug test, and disrespectful behavior.

ISSUES

The following issues are presented for adjudication:

1. Whether Charles engaged in protected activity in that he complained of safety and legal violations.

2. If so, whether Charles was directly or constructively discharged because of these complaints and actions, and Estes thereby violated the Act.

3. If Estes violated the Act, what is the appropriate remedy.

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[1]References to the transcript and the exhibits are: page numbers for the hearing transcript, "C" for Charles' exhibits, "CB" for Charles' brief, and "R" for Estes' exhibits.

FINDINGS OF FACT

TESTIMONY

Mr. Terry Charles

Complainant Charles is a thirty-nine year old high school graduate. (9). He received his Class A commercial driver's license in January of 1985 and began working for Estes in October of 1990. (10, 11). He had one accident during his tenure with Estes but could not remember the date of occurrence. (13). Charles testified that his first ten years of employment with Estes were unremarkable, although he had been suspended for three days in November of 2001 for reason of having a "bad attitude." His difficulties at Estes began once he bid for and received a "halfway" run that left from the Estes terminal in Greensboro, North Carolina to meet with another driver in Gainesville, Virginia. (16, 17). Charles began this run in August of 2000, at which time the paid distance was 260 miles each way. (17). After several weeks the run's meeting point was changed to New Baltimore, Virginia due to complaints from the owner of the parking lot where the meet had been taking place.[2] (18). The actual round trip distance for this modified run was 520 miles and it paid 269 miles for the portion traveling to New Baltimore and 260 miles for the return potion. (19). Estes instructed Charles to complete the run within the ten hour period between 9:30 pm and 7:30 am. During this ten hour time frame Charles was to perform all tasks required to complete the run including all driving, trailer swapping, inspections, breaks and waiting for the other truck to arrive. (19). During his testimony Charles initially stated that the run could not be completed in the assigned ten hour period due to speed limits, traffic delays, and the time required to carry out non-driving duties. In order to complete the run within ten hours he stated that he would have had to maintain an impossible average speed of fifty-two miles per hour. (19, 20, 21). Charles later stated that in his brief that in order to complete the longer New Baltimore run in four and one half hours, allowing for one hour of non-driving activities, he would have had to travel at 57.777 mph to 58.88 mph, but that this was impossible since the maximum speed limit in Virginia was 55 mph. (CB 2). In order to complete the New Baltimore run on time he falsified the log books Estes required him to keep. (34, 12). Charles did not present any of his log books from the Greenville or New Baltimore runs in support of this claim. (34).

[2]Although Charles, along with Estes management, testified that the run's meeting point had been changed from Gainesville to New Baltimore, Charles post-hearing brief states the opposite. (CB 2). Because Charles' post-hearing is the only source stating that the meeting point was changed from New Baltimore to Gainesville, I resolve this inconsistency by finding that the meeting point was changed from Gainesville to New Baltimore and not vice versa.

At the end of March 2002 Charles' run was again modified. (31). The exchange point was relocated to Opal, Virginia, shortening the run by fifty miles to a total distance of 480 miles. (31, 32). The roads composing the route remained the same as did the ten hour time period allotted to complete it. (32). Although initially returning from Opal to Greensboro between 8:30 and 9:00 am, he was later able to return between 7:30 and 8:00 by traveling at faster speeds. (25). Because he was consistently late, Estes managers Danny McPherson and Aryln Wall had on numerous occasions instructed him to have his run completed by 7:30 am. In response, Charles complained of being prevented from doing so because of departure delays and not being accorded enough time make the run in a safe manner. (23). Wall responded by telling Charles that leaving late did not excuse him from returning on time. (25). Charles claimed that his return times were also delayed by being required to check in with the mechanic. (28, 29). Charles testified that legally, however, this non-driving time was not counted against the ten hours he could drive without being required to take an eight hour break. (30). Instead, it counted as "on-duty, not driving" time, of which he was allowed five hours before a break (in addition to the ten hours of drive time). (30). Because of his complaints regarding the run to Opal, Estes' vice president of safety, Curtis Carr, instructed local safety manager Jerry Davis to ride along with Charles on two consecutive nights. (32). The purpose of the ride along was to verify or discredit the safety issues Charles was reporting to Wall and McPherson. Charles testified that he told Davis he would have to speed in order to complete these two runs on time and that Davis has encouraged him to do so.

Charles testified that he was fired on Tuesday, September 24, 2002 for insubordination. (37). Upon returning that morning from his run to Opal, Wall notified him that he had been selected to take a random drug test. Charles asked to take the test in the afternoon or the next day as he had previous arrangements to meet with his father for breakfast. (39). Wall and McPherson then asked Charles if he was refusing to take the test. Charles stated that he was not refusing but again asked if he could delay taking the test. (41). Wall and McPherson again asked him if he was refusing to take the test. (42). Charles responded by asking them to sign his trip report. Wall then notified Charles that he was being suspended for five days due to exhibiting a "bad attitude." (42). Charles then left Wall's office. He did not leave immediately for the drug testing office but cleaned out his truck, called his wife from a convenience store, and drove six miles to his home to collect a tape recorder. (44). He had signed into the Estes terminal at 7:50 am but did not take the test until 9:22 am. (43). Charles acknowledged that he was required to take the test immediately upon being told to do so and that refusing to take the test was grounds for termination. (40, 41). After taking the test he took a receipt for the testing back to Estes. Upon his return, Wall, Davis and McPherson were in Wall's office. (45). Wall instructed Charles to sit and wait for the completion of his suspension papers. (47). Charles testified that he refused to sit because his back hurt after sitting for so long during the previous night's run and that after being told to sit several times he was terminated.

Charles also testified that he had at one point hired an attorney to write a letter to Estes requesting that Estes extend his run back to the original Gainsville, VA exchange point. (47). When asked why he had this letter written, Charles stated that he felt that "he (another Estes driver) could run it by whatever means he could run it, you know, it would be the same for me." (47, 48). Estes did not agree to make changes to the run.

Charles concluded his testimony by noting that he had loved his job with Estes and had tried to remain "calm, cool [and] collected" when meeting with company management. (50). However, he also noted that he had been suspended for three days in November of 2001, also for reason of having a "bad attitude."

On cross examination Charles admitted that the run to Opal could be legally completed within the fifteen hour window allowed by law. (55, 56). He would not agree that the Gainesville/New Baltimore run could be completed in ten hours of driving, stating that he exceeded the speed limit to stay within time requirements. (56, 57). However, when asked why his September 19, 2002 letter demanded that he be reinstated to the longer Gainesville/New Baltimore run, Charles stated that another Estes driver had been able to complete the run in a legal manner and that he therefore felt he could attain the same result. After further questioning he admitted that although he felt the run was illegal, there was some way of making the run in a legal manner. (59, 60). Charles then reiterated his contention that some of his time difficulties with the Opal run were attributable to loading delays that resulted in him starting later than 9:30 pm. (63). He denied that Estes management's real issue concerning his performance was his returning three or four hours late without an excuse. However, he did admit to sleeping along his route. (64, 65). When asked if while taking his breaks he was intentionally delaying freight, Charles responded "I was taking my break, yes." He also acknowledged that fellow drivers had reported observing him delaying freight, loafing and sleeping on the job. (65). Later in his testimony, Charles elaborated on this issue when he admitted to "relaxing" on certain days at the end of each month. As a result of "relaxing" he would arrive back at the Estes terminal three or more hours late following the Opal run. (99). When he would arrive late he would falsify his log to show an arrival time earlier than what he actually achieved. (99). He conceded that returning late from his runs caused operational problems for the company. (83, 89). As a result of this apparent log discrepancy, Estes arranged for Jerry Davis, the district safety manager, to ride along with Charles on the Opal run. (105). Davis did so on July 24th and 25th, 2002, an experience which on August 2, 2002 resulted in Davis instructing Charles by written warning to log his runs as driven and to drive at the speed limit. (117). Even following Davis' comment, on September 9, 2002 Charles arrived at the terminal at 12:20 pm but logged in at 7:30 am. (117).

Estes' referred Charles to the complaint he filed with the North Carolina Department of Labor, in which he stated that he had been fired by Estes because of safety complaints he had made. (R 1); (67). However, during questioning as to why he had been terminated,

Charles responded as follows:

> Q: Listen to my question. Any reason other than you getting back late that they were on to you?
>
> A: They wanted that load back.
>
> Q: Is there any other reason, sir?
>
> A: As far as what?
>
> Q: Why they were after you and why you were terminated.
>
> A: As far as my understanding, no.

(70). Although he contended that Estes' managers put a great deal of pressure on him to return from his run within ten hours, he admitted that at no point did he receive an official warning or a suspension for being late in returning to the terminal. (101, 102). Estes then referred Charles to its employee rule book (R-4) which listed refusing a drug test, not cooperating with a drug test, failure to follow a supervisor's instruction, insubordination, and falsification of government or company documents as offenses for which an employee could be terminated. (73). Charles admitted that these offenses were ones for which Estes had the right to terminate an employee and that he did not have direct knowledge of any employee who, after committing one of the offenses, had not been terminated. (76). In regard to the Estes drug and alcohol policy (R-5), copies of which had been openly posted during the last three years of Charles' employment, Charles acknowledged that employees were subject to automatic termination for refusing a test and were instructed to proceed immediately to the test site once instructed to do so. (77-79). Estes then presented copies of the Department of Transportation regulations requiring that a driver, once notified of being selected to take a drug test, must proceed without deviation to the test location. (80). Charles also acknowledged his familiarity with these regulations, having received a copy of the regulations shortly before his termination. He also admitted to not proceeding directly to the testing center, which is a four minute drive from the Estes' terminal in Greenville. (80, 81, 136). Instead, Charles was, by his own estimate, thirty-five to forty minutes late in arriving at the testing center as a result of cleaning out his truck, stopping to make a phone call, and traveling to his house. (82). Referring again to drug testing, Charles did not feel that his action in not proceeding directly to the testing facility violated company policy or the law, primarily because he did not have a history of drug or alcohol problems. (130).

At the time he was terminated, Charles admitted to being told five or six times by Wall to sit down but claimed that he had refused to do so as a result of being sore from

sitting so long during the previous night's run. (132). He denied that his manner, which included wearing tinted glasses in the management office, was aggressive toward Wall or McPherson. However, he conceded to covertly taping the conversation and deliberately avoiding the use of any threatening language his recorder might have captured. (132, 133). Charles also admitted to an additional incident of insubordinate behavior that occurred on June 11, 2001 and resulted in verbal counseling on June 14, 2001. (134, 135).

Mr. Curtis Carr

Curtis Carr, Estes' vice president of safety, testified at the May 7, 2003 hearing. (140). Carr testified that the Estes code of conduct (R-4) in effect in 2001 and 2002 defined dischargeable offenses as including failure to follow directions, violations of drug and alcohol policies (including not proceeding directly to a drug test facility), and disruptive behavior. (143). Sanctioned driver behavior did not include relaxing at the end of the month and returning later than expected. (147). The drug and alcohol policy required drivers notified to take the test to immediately proceed to the testing facility. Carr testified that the drug testing program works in a random selection method whereby an outside company, Pembroke Occupational Health (Pembroke), generates a list of employees to be tested during a given month. (158, 159). This list is forwarded to Estes and the employees selected are notified that they must proceed to testing. At no point does Estes have any influence over who is tested. In this instance, the list of employees to be tested was forwarded to Estes from Pembroke on September 10, 2003, more than one week prior to Charles' letter to Estes regarding alleged safety violations. (160). Carr then indicated a list of employees who had been terminated for not following the drug testing policy, including a driver who went home prior to traveling to the testing facility and another driver who took too long to get to the testing facility. (160, 161). Carr recalled that Charles had been subject to previous random drug tests but had complied with the company's testing policy on each of those occasions. (162).

Carr also testified that he had determined, as a result of Davis' ride-along trips with Charles in July of 2002, that the Opal run could be carried out legally and that Charles had not been logging his trips correctly. (151). In addition, Carr stated that the run was legal as per the Rand-McNally Milemaker, a trip planning guide which takes into account speed limits and distance in calculating travels times and is utilized by the trucking industry and government enforcement agencies. (151); (R-23). Carr also stated that other drivers had been able to complete the Opal run on time and legally without any difficulties. (154, 157). Carr was aware that, as a result of the findings made during the ride alongs, Davis issued Charles a written warning on August 2, 2002 (R-13) instructing him to log his runs as they occurred and to drive at the speed limit. (153).

Carr acknowledged the receipt of a letter (R-22) dated September 19, 2002 from Charles' attorney stating that Charles had been pressured by Estes management to drive

in an illegal manner and requesting that Charles's driving assignment be restored to the longer Gainesville/New Baltimore run. (153). On September 25, 2002 Estes issued a response letter (R-23) denying all of Charles' allegations. (154).

On cross examination, Charles called into question the accuracy of Estes' assertion that other drivers had been able to complete the Gainesville/New Baltimore run by pointing out numerous errors in the records Estes introduced for these drivers. Carr responded that these errors were different in nature from Charles' deliberately inaccurate log entries made on documents that Charles had personally signed, not documents accidently compiled incorrectly by the company. (184). Carr concluded his testimony by reiterating that Charles had been fired for reasons of insubordination and failure to follow a supervisors instructions, instructions which included that Charles proceed immediately to the drug testing facility. (187).

Mr. Jerry Davis

Estes district safety manager Jerry Davis testified that he rode along with Charles on the Greensboro to Opal run on the nights of July 24th and 26th, 2002. Charles completed the July 24th run in nine hours and six minutes of drive time and the second night's run in nine hours and thirty minutes of drive time. (192). As executed, both runs were legal. Davis stated that at no point did he tell Charles, as Charles alleged during his testimony, to speed in order to meet time requirements,. (191, 192). Davis buttressed this statement by noting that Charles in his rebuttal to the August 2, 2002 written warning made no mention of being told by Davis to exceed the speed limit. (196). Davis also pointed out that since the drive times on both nights were well within legal limits there would have been no reason for Charles to speed. (192).

Davis was present on September 24, 2002 when Charles was terminated. (192). Charles initially refused to proceed immediately to the testing facility and left only after being issued a five day suspension. When Charles returned from drug testing, he was asked to sit three to four times while his suspension papers were being prepared but refused to do so. During this meeting Charles also exhibited an aggressive physical stance.

Mr. William McPherson

William McPherson, manager of the Estes terminal in Greensboro, was the final Estes official to testify. (213). He confirmed that although Charles' run was scheduled to start at 9:30 pm and end at 7:30 am, these times were not rigid and Charles was not terminated for not meeting them. (216). McPherson added that Charles had never been written up for not meeting the scheduled times, and that when the meeting point of Charles' run was changed from New Baltimore to Opal, the motivation in doing so was to accommodate Charles. (217, 219). The change was not motivated by the run being illegal.

McPherson reiterated that Estes' policy and the law required Charles to proceed immediately to the drug testing facility upon being notified to do so. (219). On the day he was fired Charles acted in apposition to this policy by initially refusing to proceed to the facility, stating that he had made other plans. Only after being given a five day suspension did Charles seem to relent and leave for testing. However, McPherson personally observed that Charles left the terminal heading in the direction opposite that of the testing facility. (226, 227). Charles stopped at a BP convenience store for eight to ten minutes to make a telephone call before continuing again in the direction opposite that of the testing facility. (227). Upon returning to the terminal after his drug testing. Charles would not sit as directed but instead exhibited aggressive body language and continued to wear his mirrored sunglasses. (229, 230). At that point McPherson terminated Charles for the conduct he had exhibited that day, which included "bad attitude," disruptive behavior and failure to follow directions. McPherson stressed that Charles was not fired for being late in returning from his runs, complaining about the scheduling of his runs, or falsifying his logs.

Ms. Terry Kennedy

Estes road driver Terry Kennedy was the final witness called. At the time of her testimony, Kennedy had been a truck driver for twenty years and had been employed by Estes as driver for seven years and nine months. (256, 257). Kennedy testified that she had spoken with Charles as to why she had observed him returning at 9:00 am from a run she knew from personal experience to take less time. (258). According to Kennedy, Charles explained that his lateness was attributable to his not wanting to arrive home at an early hour. (258). Doing so would cause his dog to start barking, which would in turn awaken his sleeping wife and daughter. (258). Therefore, instead of returning directly to the terminal, Charles told Kennedy that on the return portion of his run he would take a break to sleep along the side of the road. She also testified that Charles had never complained to her that he was late in returning because his run was too long. (259).

CONCLUSIONS OF LAW

To prevail on a claim, the employee must prove by a preponderance of the evidence that he or she engaged in protected activity; that his or her employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against the employee; and that there is a causal connection between the protected activity and the adverse action. *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Systems, Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc*., 836 F.2d 226, 228 (6thCir. 1987). When a case is tried fully on the merits, as this case was, there is no need to determine whether the employee presented a *prima facie* case and whether the employer rebutted that showing. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 709, 713-14 (1983); *Pike v. Public Storage Companies, Inc.*, 98-STA-35 (ARB July 8, 1998). Although a *pro se*

complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the complainant must still carry the burden of proving the necessary elements of discrimination. *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991).

1. Protected Activity

The Act provides:

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because...
>
> (A) the employee...has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding...

49 U.S.C.A. § 31105(a)(1)(A) (1997).

Internal complaints to any level of management have consistently been held to be "complaints" under 49 U.S.C.A. § 31105(a)(1)(A). *Zurenda v. J & K Plumbing & Heating Co. Inc.*, 97-STA-16 (ARB June 12, 1998); *Doyle v. Rich Transport, Inc., 93-STA-17* (Sec'y Apr. 1, 1984). Complaints do not have to refer to particular safety standards in order to be protected. *See Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 1987) *slip op.* at 5-6; *Nix v. Nehi-R.C. Bottling Complainant*, 84-STA-1 (Sec'y July 31, 1984). Further, the alleged safety violations need not be proven in order for the complainants to be considered protected activity. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992).

Here, Charles' has made complaints pursuant to § 31105(a)(1)(A) because he had complained to Estes management that the runs he had been assigned were unsafe and illegal. Specifically, Charles has alleged that Estes pressured him to complete his entire run, including all driving and non-driving duties, within the allotted ten hour period and that to do so required him to exceed speed limits and falsify his log books. Charles also alleges that when he complained to Estes that he could not complete his runs as scheduled without committing these violations, Estes ignored his complaints and demanded that he not miss the established 7:30 am return time. Charles made these complaints in his September 19, 2002 letter when he accused Estes of putting pressure on him to operate in an illegal and unsafe manner. (R 22). He also made complaints in his rebuttal to the August 2, 2002 written warning and in numerous verbal statements to Estes management complaining about the safety and legality of his runs. (R 13). Charles' complaints were related to the following U.S. Department of Transportation regulations:

> ...[N]o motor carrier shall permit or require any driver used by it to drive nor shall any driver drive...[m]ore than 10 hours following 8 consecutive hours off duty...

49 C.F.R. § 395.3 (2001)

> (a)...[E]very motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24 hour period...
>
> (e)...[M]aking of false reports in connection with such duty activities shall make the driver and/or the carrier liable to prosecution.

49 C.F.R. § 395.8 (2001)

Estes has not disputed that Charles made these complaints. However, Estes has challenged the accuracy of Charles' complaints. In support, Estes has effectively demonstrated that Charles' complaints were unfounded. The runs were safe and legal as demonstrated by the performance of other Estes drivers and the ride-alongs by Davis with Charles. In addition, the mileage and travel times listed in the Rand-McNally Milemaker guide, a guide relied upon as a standard by the trucking industry and regulatory agencies, would allow the run to be performed in a safe and legal manner. More importantly to the issue of whether Charles' complaints were accurate or even his true motivation in bringing this claim, Charles at various points testified that the runs were safe and legal. Charles' belief in the safety and legality of the runs is further confirmed by his request in the September 19, 2002 letter that he be restored to the longer run. However, the Act does not call for a determination of the claimant's motivation in filing a claim. It is the respondent's motive in discharging the complaint that is under scrutiny. *Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y July 11, 1991). Therefore, although the evidence shows that there is no factual basis to support any of Charles' complaints and that he knew his complaints were untrue, he engaged in protected activity by making complaints pursuant to § 31105(a)(1)(A).

2. Employer awareness of protected activity

Estes' representatives acknowledged that they received verbal complaints from Charles related to the safety and legality of his runs. I also find that Charles' rebuttal to his August 2, 2002 Notice of Written Warning provided Estes with awareness of his protected activity. In the rebuttal, Charles defended himself against accusations of falsifying his log book entries by asserting that his actions were an attempt to operate in a safe and legal manner, implying that Estes was forcing him to operate in an unsafe and illegal manner by issuing the warning. (R 13). Estes' also acknowledged receipt of the September 19, 2002 letter from Charles' attorney in which Charles alleged Estes pressured him to operate

in an unsafe and illegal manner. Based on this evidence, Charles has therefore demonstrated Estes' awareness of his protected activity.

3. Adverse action motivated by discriminatory intent

A complainant must also establish that the respondent took adverse action against him or her. Any employment action by an employer which is unfavorable to the employee's compensation, or terms, conditions, or privileges of employment, can constitute adverse action. *Long v. Roadway Express, Inc.*, 88-STA-31 (Sec'y Mar. 9, 1990). In this case, Estes issued Charles formal warnings, gave him suspensions, and ultimately terminated his employment. It is therefore clear that Charles was subject to adverse employment action.

4. Causal connection

Charles must demonstrate that a "casual link" exists between his protected activity and Estes' adverse action. *Yellow Freight Systems, Inc. v. Reich*, No. 93-3488 (6th Cir. 1994). Direct evidence is not required for a showing of causation. *Clay v. Castle Coal & Oil Co.,Inc.*, 90-STA-37 (Sec'y Nov. 12, 1991). Under the Act, the ultimate burden of proof usually remains on the complainant throughout the proceeding. *Byrd v. Consolidated motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, Final Dec. and Ord., May 5, 1998, slip op. at 4 n.2. There is one exception to the burden of proof remaining on the complainant. Under the "dual motive" analysis, where the trier of fact finds that there are legitimate reasons for the employer's adverse action in addition to unlawful reasons, the burden of proof shifts to the respondent to show, by a preponderance of the evidence, that it would have taken the same adverse action even if the complainant had not engaged in any protected activity. *Clean Harbors*, 146 F.3d at 21-22; *Carroll v. United States Dep't of Labor*, 78 F.3d 352, 357 (8th Cir. 1996) (under employee protection provision of Energy Reorganization Act); *Faust v. Chemical Leaman Tank Lines, Inc.*, Case No. 93-STA-15, Sec. Sec. and Rem. Ord., Apr. 2, 1996, slip op. at 9. *Caimano v. Brinks' Incorporated*, 95-STA-4, slip op. at 23-24 (Sec'y Jan. 26, 1996) (citation omitted). Close proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)). A six day interval between a protected activity and an adverse action has been found to meet the criterion to show causation. *Newkirk v. Cypress Trucking Lines*, 88-STA-17 (Sec'y Feb. 13, 1989). See also *Chapman v. T.O. Haas Tire Co.*, 94-STA-2 (sec'y Aug. 3, 1994). However, evidence of wholly unprotected conduct immediately preceding an adverse employment action may militate against an inference of causation. *Etchason v. Carry Companies of Illinois, Inc.*, 92-STA-12 (Sec'y Mar. 20, 1995) (citing *Monteer v. Milky Way Transp. Co., Inc.*, 90-STA-9 (Sec'y July 31, 1990), slip op. at 4). Even when employees engage in protected activity, employers may legitimately discipline them for insubordination and disruptive behavior. *Logan v. United Parcel Service*, 96-STA-2 (ARB

Dec. 19, 1996). *Logan* was a dual motive case in which the respondent was able to demonstrate that it would have discharged the complaint even if not for the protected activity.

Charles engaged in protected activity when he made verbal and written complaints to Estes regarding his runs to Gainesville, New Baltimore and Opal. At the outset, the fact that he had been making these complaints for several years without adverse reaction by Estes indicates that no causal connection exits regarding Charles' termination. This is especially true since during the period Charles was making his complaints, he committed several legal and policy violations which provided Estes ample non-discriminatory grounds for terminating him, but Estes continued to employ him. However, what does call Estes' motivation in terminating Charles into question, unlike Charles' previous actions that were potentially protected, was that five days prior to the termination Charles' attorney had written Estes a letter alleging safety and legal violations. This change in tactics by Charles in drawing outside legal attention to his complaints could have given Estes motivation to finally rid themselves of an employee it viewed as problematic. As such, this case could be analyzed as a mixed motive case because on the day of his termination Charles had committed several offenses which, by his own admission, were potential grounds for termination, and he had also just sent the protected letter. Charles' offenses provided a legitimate, non-discriminatory basis for termination, but the letter, if it provided even partial motivation for the termination, was a discriminatory basis. The consequence of analyzing this matter as a mixed-motive case would be that the respondent, Estes, would acquire burden of demonstrating that it would have taken its adverse action regardless of the discriminatory motivation. However, a complainant is still ultimately responsible for proving the elements of his or her case. Unfortunately for Charles, he has presented no evidence to indicate that Estes' decision to terminate him was motivated by the September 19, 2002 letter. The only evidence regarding the letter is that Charles' sent it, Estes received, and Estes responded to it in a letter dated September 25, 2003, the day after Charles was terminated. That Estes' response states an inquiry was undertaken to determine the veracity of Charles' claims indicates that Estes had knowledge of the letter prior to terminating Charles. (R 23). However, without providing further evidence as to how Estes regarded the letter it cannot be said that Estes became motivated to terminate Charles as a result of the letter. Charles failed to generate evidence that Estes management in Greensboro even had knowledge of the letter. In determining Estes' motivation in terminating Charles' I am therefore left with examining the nature of his actions on the day of his termination. It is undisputed that Charles initially refused to take the drug test when instructed to do so by his managers. It is also undisputed that Charles, after agreeing to take the test that day, did not proceed directly to the testing facility. These actions by Charles violated the following U.S. Department of Transportation regulation:

> Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site *immediately*...

49 C.F.R. § 382.305 (2001) (emphasis added)

These actions also violated Estes policy and were, by Charles' own admission, valid grounds for termination. In addition, during the course of Charles' conversation with Estes' management regarding whether and when he would take the test, Charles' behavior was such that he was given a five day suspension for exhibiting a "bad attitude." At no point during his testimony did Charles allege that this suspension was anything but deserved. Upon his return to the terminal after taking the drug test, Charles refused numerous orders to sit while waiting for the completion of papers related to his suspension, continued to wear sunglasses indoors, and exhibited a physical demeanor that three Estes witnesses described as aggressive. Only after this final encounter did Estes terminate Charles. His previous actions leading to suspensions and warnings were somewhat isolated events, never the sort of concerted hostile and insubordinate behavior exhibited in a less than three hour period on the morning of September 24, 2002. Therefore, given the nature of Charles' actions and his inability to demonstrate any illegitimate motivation regarding the adverse action taken against him by Estes', I must find that there exists no causal connection between the adverse action and his protected activity. Estes' adverse actions in first suspending Charles and then terminating him were motivated by legitimate concerns surrounding his actions on the morning of September, 24, 2002.

Even assuming that Estes' motivation in terminating Charles was in part based on Charles having sent the protected letter, Estes would still not be liable for violating the Act. As stated in *Kovas*, close proximity between a protected activity and an adverse result can raise the inference that the employment action in question was illegitimate under the Act. Here, the letter from Charles' attorney was, as I previously found, received by Estes prior to its adverse action against him. Since the letter was dated September 19, 2002 and Charles was terminated on September 24, 2002, Estes receipt of the letter was well within the six day window of suspicion articulated in *Newkirk*. Therefore, viewing this as a "dual motive" case, Estes' action in terminating Charles is suspicious and requires Estes to prove by a preponderance of the evidence that its motivation was in fact legitimate. Estes is able to meet this burden because Charles' actions on the day of his termination were of such an egregious nature. Estes' managers provided highly credible testimony regarding Charles' actions on that day and Charles' own testimony confirms most of what they alleged. Charles does deny that his behavior was aggressive but he also admits to not sitting when told to do so, wearing sunglasses in the management office, and deliberately avoiding the use of threatening language. These admissions confirm that Charles' behavior was in fact aggressive and that each accusation by Estes management was accurate. And as seen in *Etchuson*, a complaint's actions immediately preceding an adverse employment action can legitimate an employer's action even when the employee engaged in protected activity. The outcome in situations of the type seen in *Etchuson* is that an employer can legitimately take action against an employee who has engaged in protected and unprotected activity as long as the action would have been taken anyway in the absence of the protected behavior. *Logan*. This matter is clearly such a situation.

As stated previously in the analysis, Charles engaged in numerous acts worthy of termination on the morning he was terminated, including acts that were insubordinate, disruptive, illegal, and against company policy. Charles acknowledged that these were all, individually, legitimate basis for his termination and that he knew of no other employee who had committed similar acts and had not been terminated. Further, if Estes had developed its intent to terminate Charles prior to September 24, 2003 as a result of receiving the protected letter and had been waiting for Charles to provide them with a legitimate basis for termination, he provided that basis when he initially refused to take the drug test. Yet, Estes terminated Charles only after he also exhibited a "bad attitude," did not proceed directly to the testing facility, and acted aggressively toward Estes management. That Charles was terminated only after carrying out these additional unprotected infractions of the law and company policy clearly demonstrates that Estes' motivation was primarily based on Charles' actions on the day in question and not the sending of the letter or any of Charles' other protected activities. Therefore, even analyzed as a "dual motive" case, Estes is not liable for violating the Act.

CONCLUSION

In this case, it is demonstrated by direct evidence that Charles was disciplined and terminated for falsifying log book entries, not traveling immediately to the drug testing facility, acting aggressively towards Estes management, exhibiting a "bad attitude," and insubordination. These motivations are not related to any protected activity by Charles. Estes' has therefore expressed reasons for disciplining and ultimately terminating Charles that are not related to any activity protected under the Act. Therefore, Charles is not entitled to reinstatement, seniority or money damages.

RECOMMENDED ORDER

I hereby **RECOMMEND** that Complainant's claim under the Act be **DENIED**.

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. see 29 C.F.R. §1978.109(a); 61 Fed. Reg.

19978 (1996).